UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	
	:	
- *v.* -	:	
	:	
JOEL MARGULIES,	:	S2 17 Cr. 638 (JMF)
	:	
Defendant.	:	
	:	

GOVERNMENT'S MEMORANDUM OF LAW IN OPPOSITION TO THE DEFENDANT'S PRETRIAL MOTIONS

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PRELIMINARY STATEMENT

The Government respectfully submits this memorandum in response to several motions filed on May 29, 2019 and on June 4 and 10, 2019, by defendant Joel Margulies. Those motions (collectively, the "Defense Motions") consist of (a) a motion to suppress evidence obtained pursuant to a search warrant from Margulies's residence in Tennessee, *see* ECF Doc. 139[1]; (b) a motion *in limine* regarding "interrogation statements and cocaine," *see* ECF Doc. 140; (c) a motion *in limine* regarding "opinion regarding guilt or credibility," *see* ECF Doc. 141; (d) a motion *in limine* regarding Margulies's employment with the Key World Wide Foundation, *see* ECF Doc. 142; (e) a motion *in limine* regarding duplicate and chain emails, *see* ECF Doc. 143; and (f) a motion in *limine* "to allow exculpatory statements of Lisa Bershan," *see* ECF Doc. 147 & 150. The Court should deny the Defense Motions in their entirety.

As elaborated below, this prosecution stems from Margulies's criminal conduct, over a roughly four-year period from 2013 through 2017, that involved his participation in two related and overlapping investment fraud schemes, aggravated identity theft in connection with his creation of fake documents used in one of the fraud schemes, the purchase of cocaine for his personal use and the use of a co-conspirator using misappropriated investor funds, and the illegal provision of a firearm to one of his co-conspirators after she received what she perceived to be threatening messages from disgruntled investors.

In the course of investigating this conduct, the Government sought and obtained authority to search Margulies's residence, located in Murfreesboro, Tennessee. To obtain this warrant, the Government presented the reviewing magistrate judge with detailed evidence concerning

[1] Unless otherwise stated, citations to "ECF Doc." are citations to the docket of this case, No. 17 Cr. 638.

Margulies's participation in a fraud scheme, as well as evidence that another company run by Margulies before, during, and after that fraud scheme may also have engaged in fraud. As found by the magistrate judge, the evidence cited by the Government provided probable cause to believe Margulies had engaged in a fraud conspiracy and further provided probable cause to support a particular, focused seizure of relevant items from the residence. The warrant was sufficiently particular on its face, and agents with the Federal Bureau of Investigation executed the warrants as written and seized items that were within the scope of the warrant. Additionally, even if the challenged evidence was beyond the scope of the warrant, which the Government submits it was not, that evidence would nonetheless be admissible under the plain-view doctrine. Nothing about the format or execution of the warrant justifies the suppression of relevant evidence.

Margulies also filed five motions *in limine*. With a few minor exceptions that are explained below, the motions *in limine* are meritless. They run the gamut from the frivolous (*e.g.*, the motion seeking a ruling regarding the format in which the Government is to display emails to the jury) to the premature (*e.g.*, the motion seeking to exclude the cocaine-related evidence) to the obvious (*e.g.*, the motion that asserts that prosecutors may not state to the jury "a personal opinion regarding the guilt or credibility of a defendant," (EFC Doc. 141, at 4-5)) and to the legally unsupported (*e.g.*, the motion to preclude Government witnesses from testifying about the credibility of Margulies's statements in furtherance of the fraud).

PROCEDURAL HISTORY

On or about October 6, 2017, the Honorable Gabriel W. Gorenstein, United States Magistrate Judge, Southern District of New York, signed a sealed complaint, *United States v. Lisa Bershan et al.*, 17 Mag. 7463 (the "Complaint"), charging Lisa Bershan, Barry Schwartz,

and Joel Margulies (collectively, the "defendants") with one count of conspiracy to commit securities fraud and wire fraud, in violation of Title 18, United States Code, Section 371; one count of securities fraud, in violation of Title 15, United States Code, Sections 78j(b) and 78ff, Title 17, Code of Federal Regulations, Section 240.10b-5, and Title 18, United States Code, Section 2; and one count of wire fraud, in violation of Title 18, United States Code, Sections 1343 and 2. As explained in more detail below, on or about October 10, 2017, the Honorable Jeffrey S. Frensley, United States Magistrate Judge, Middle District of Tennessee, upon an application and affidavit by FBI Special Agent Angela Tassone, signed a search and seizure warrant for Margulies's residence in Murfreesboro, Tennessee. On the morning of October 11, 2017, Margulies was arrested and the search warrant for his residence was executed. Later that day, Margulies was transferred to the FBI field office in Nashville, Tennessee, where, after being advised of his *Miranda* rights, Margulies agreed to be interviewed and made statements to FBI agents. Margulies then had his initial appearance and was released on bail.

On or about October 13, 2017, a grand jury in this District returned Indictment 17 Cr. 638 (RWS) (the "Indictment"), charging Margulies with the following offenses: (1) conspiracy to commit securities fraud and wire fraud, in violation of Title 18, United States Code, Section 371; (2) securities fraud, in violation of Title 15, United States Code, Sections 78j(b) & 78ff; Title 17, Code of Federal Regulations, Section 240.10b-5; and Title 18, United States Code, Section 2; and (3) wire fraud, in violation of Title 18, United States Code, Sections 1343 and 2. Margulies was arraigned on the Indictment on October 25, 2017.

On or about August 20, 2018, Schwartz entered a plea of guilty to Count One of the Indictment. On or about December 18, 2018, Bershan entered a plea of guilty to all counts of a superseding information. Both Schwartz and Bershan are awaiting sentencing.

On or about December 19, 2018, the Government sought, and a grand jury in this District returned, Superseding Indictment S2 17 Cr. 638 (RWS) (the "Superseding Indictment" or "S2 Indict."), charging Margulies with the following offenses: (1) conspiracy to commit wire fraud, in violation of Title 18, United States Code, Section 1349 (Count One); (2) wire fraud, in violation of Title 18, United States Code, Sections 1343 and 2 (Count Two); (3) aggravated identity theft, in violation of Title 18, United States Code, Sections 1028A and 2 (Count Three); (4) conspiracy to commit securities fraud and wire fraud, in violation of Title 18, United States Code, Section 371 (Count Four); (5) securities fraud, in violation of Title 15, United States Code, Sections 78j(b) and 78ff, Title 17, Code of Federal Regulations, Section 240.10b-5, and Title 18, United States Code, Section 2 (Count Five); (6) wire fraud, in violation of Title 18, United States Code, Sections 1343 and 2 (Count Six); (7) conspiracy to distribute narcotics, in violation of Title 21, United States Code, Section 846 (Count Seven); and (8) illegal transportation of a firearm, in violation of Title 18, United States Code, Sections 922(a)(5), 924(a)(1)(D) and 2 (Count Eight).

As charged in the Superseding Indictment, Margulies, along with co-conspirators Bershan and Schwartz, conspired over the course of at least four years to defraud investors in two companies. First, Margulies and his co-conspirators schemed to defraud investors in All American Pet Company, Inc. ("AAPT" or "AAPC"), conduct that forms the basis for Counts One and Two of the Superseding Indictment. In connection with the AAPT fraud, Margulies stole the identities of real individuals, conduct that forms the basis for Count Three of the Superseding Indictment (the "Identity Theft"). Second, overlapping in time with the AAPT fraud, Margulies and his co-conspirators schemed to defraud investors in a company originally known as The Awake Company and later renamed Starship Snacks Corp. ("Starship"), conduct

that forms the basis for Counts Four, Five, and Six of the Superseding Indictment. In connection with the Starship fraud, Margulies and Bershan used misappropriated Starship investor funds to, among other things, purchase and distribute cocaine, conduct that forms the basis for Count Seven of the Indictment (the "Narcotics Conspiracy"). Also in connection with the Starship fraud, when Bershan was threatened by an aggrieved investor, Margulies illegally transported a firearm to Bershan for her protection, conduct that forms the basis for Count Eight of the Indictment (the "Firearm Transportation").

On or about December 27, 2018, Margulies filed a motion to sever the Narcotics Conspiracy charge (Count Seven) and the Firearm Transportation charge (Count Eight) from the other charges in the Superseding Indictment. On or about April 5, 2019, this Court denied Margulies's motion to sever the Firearm Transportation charge but granted Margulies's motion to sever the Narcotics Conspiracy charge. (ECF Doc. 131). A date of July 16, 2019 was set for trial of Counts One through Six, and Eight, and a pre-trial motions schedule was entered. *Id.*

RELEVANT FACTUAL BACKGROUND

I. AAPT Fraud (2013-2017)

Beginning in at least October 2013, Margulies, Bershan, and Schwartz attempted to raise money from investors in AAPT, a company that marketed and sold food bars and other products for dogs. (S2 Indict. ¶ 1). AAPT's stock was publicly traded on the over-the-counter ("OTC") market. (*Id.* ¶ 2). Margulies was in charge of marketing and investor relations for AAPT, and Schwartz and Bershan were at various times the President or Chief Executive Officer of AAPT. (*Id.* ¶ 3). Margulies and his co-conspirators attempted to raise funds for AAPT by seeking loans from AAPT investors based on several misrepresentations, including the following:

a. that the Internal Revenue Service (the "IRS") had accepted a settlement offer in compromise (the "Offer in Compromise") from AAPT that significantly reduced back taxes AAPT owed to the IRS;

b. that Bershan had paid to the IRS the amount of the Offer in Compromise and had thus absolved AAPT of its outstanding tax liability;

c. that Bershan was the beneficial owner of a bank account (the "Beneficial Bank Account") containing over $6.9 million; and

d. that Bershan would personally guarantee some of the loans.

(*Id.* ¶ 5). However, as Margulies knew, the IRS had not accepted an Offer in Compromise from AAPT, AAPT still owed significant amounts to the IRS, the Beneficial Bank Account did not exist, and neither Bershan nor AAPT had assets that could guarantee the loans. (*Id.*). Based on these misrepresentations, Margulies and his co-conspirators raised at least approximately $500,000 from investors, which funds the conspirators misappropriated for their own use. (*Id.* ¶¶ 5-6).

In early 2015, Margulies and his co-conspirators turned their efforts from the AAPT fraud to the Starship fraud. Then, in 2016, as the Starship fraud began to unravel, Margulies and Bershan attempted to revive the AAPT fraud, by soliciting investments based on the following misrepresentations, among others:

a. that Nestlé U.S.A. ("Nestlé") – a component of Nestlé SA, the international food and beverage company headquartered in Switzerland – had approached AAPT about the exclusive licensing of AAPT's patent;

b. that Nestlé wished to merge AAPT into Nestlé; and

c. that, in connection with such an merger, Nestlé was prepared to assume the outstanding debt of AAPT and to issue shares of Nestlé to current AAPT shareholders.

(*Id.* ¶ 7). In truth, Nestlé had not approached AAPT or put forth any proposal to license AAPT's patent, to merge AAPT into Nestlé, to assume AAPT's outstanding debt, or to issue Nestlé shares to AAPT shareholders. (*Id.*).

II. Aggravated Identity Theft in Connection with AAPT Fraud

The Government expects the evidence at trial will establish that, in connection with his efforts to raise funds from AAPT investors from 2013 through 2017, Margulies used the names of real individuals, without their knowledge or consent, to create fraudulent letters and documentation that he and his co-conspirators provided to AAPT investors. For example, in attempting to raise funds based on misrepresentations regarding Nestlé, Margulies fraudulently created letters with the name and purported signature of an individual who worked for a component of Nestlé, and sent those letters to AAPT investors. (*See id.* ¶ 13). The Government expects the evidence at trial will demonstrate that the real individual ("Victim-2") did not know Margulies, and did not authorize Margulies to use Victim-2's name or purported signature in any way. In addition, in connection with efforts to raise money for AAPT in late 2013 and 2014, the conspirators transmitted a false letter, purportedly from the IRS and purportedly signed by an IRS employee, to AAPT investors. The Government expects the evidence at trial will demonstrate that the real IRS employee did not author the letter in question, and did not authorize the conspirators to use her name or signature in any way. Margulies's unauthorized use of other individuals' names and signatures in connection with the AAPT fraud forms the basis for the aggravated identity theft charge, Count Three, in the Indictment.

III. Starship Fraud (2015-2017)

Beginning in mid-2015, Margulies, along with co-conspirators Bershan and Schwartz, began selling stock in a company that was initially called The Awake Company but later

renamed "Starship Snacks" (S2 Indict. ¶ 15). Margulies and his conspirators raised more than approximately $2 million from Starship investors based on the following misrepresentations, among others:

a. that investments in Starship were guaranteed against losses;

b. that Starship was going to be acquired by Monster Beverage Corp. ("Monster"), a publicly-traded company, in a transaction that would be extremely lucrative for Starship investors;

c. that Starship was engaged in actual product development and had procured sample products; and

d. that Margulies, Bershan, and Schwartz had entered into non-disclosure agreements ("NDAs") with Monster that prohibited them from discussing Starship's purported acquisition by Monster and its purported product development.

(S2 Indict. ¶ 17; Compl. ¶ 9). However, as Margulies knew, there were no assets that could guarantee investments in Starship against losses; Monster had no plans to acquire Starship; Starship had not developed a product; and neither Margulies, Bershan, nor Schwartz had entered into any NDAs with Monster. (Indict. ¶ 17).

First, with respect to the guarantees of investment, Margulies and his co-conspirators made guarantees (that they had no ability or intention of honoring) in order to make investments in Starship seem safer than they actually were. Bershan and Margulies, for example, signed investment documents providing that Starship and Bershan would repurchase investors' shares at the price that they had paid for them, plus 5% interest, if those shares had not appreciated within a year. (Compl. ¶ 11(b)(i)). To make the guarantees seem more plausible, Bershan also sent investors images of herself in what appeared to be a mansion with subject lines like, "Just a glimpse—my parents sure as hell didn't leave me this." (*Id.* ¶ 11(b)(ii)). Neither Margulies, Bershan, nor Starship, however, had the financial means to honor these guarantees. (*See id.*

¶ 13). Indeed, the Government expects the evidence at trial will demonstrate that Margulies knew that Bershan had no ability to honor the guarantees because, among other things, (a) he had been involved with creating fake bank statements for the Beneficial Bank Account in connection with the AAPT fraud, and (b) was aware that Bershan had been unable to pay back investor loans in connection with the AAPT fraud.

Second, Margulies and his co-conspirators made repeated fraudulent representations that Starship was on the verge of being acquired by Monster. In or about October 2015, for example, Margulies sent an email to multiple investors stating, "[t]he deal as I am certain you have heard is done thanks in no small part to the extraordinary talents and skills of our CEO, Lisa Bershan. If you are not aware of the deal, it is a one to one – share for share exchange of [Starship] for Monster after a six month holding period of [Starship] shares." (*Id.* ¶ 12(a)(i)). Given that Monster's stock was, at the time, trading at many multiples of the price of Starship stock that Starship investors had paid, this purported transaction would have resulted in tremendous gains for Starship investors. But Starship was never acquired by Monster or any other entity, and, indeed, was never in negotiations to be acquired by Monster. (*See id.* ¶¶ 12, 14).

Third, Margulies and his co-conspirators misrepresented the nature and progress of Starship's purported business to investors. The conspirators told investors that Starship had developed its signature product, when, in reality, it had not done so. (*See id.* ¶ 15). In order to mislead investors into thinking that the product was further along than it actually was, the conspirators actually provided samples of ordinary chocolates to certain investors, falsely telling them that the chocolates were caffeinated as per Starship's business plan. (*See id.* ¶¶ 15-16).

In total, Margulies and his co-conspirators raised more than approximately $2 million from investors based on these false representations. (*Id.* ¶ 18(b)). Much of this amount was

simply misappropriated by Bershan and Schwartz, who spent more than $39,000 on plastic surgery; over $209,000 on retail purchases, including jewelry, clothes, and interior decorating; over $11,900 at a Mercedes dealership; and hundreds of thousands of dollars on luxury housing. (*Id*. ¶ 18(c)). Margulies, however, also benefited from the theft of investor funds, as he was paid by Bershan and Schwartz with investor money. (*Id.* ¶ 18(c)(vii) (alleging that, among other things, "[t]ens of thousands of additional dollars were used . . . to write checks to Margulies.")

PART ONE

Margulies's Motion to Suppress Evidence Seized from the Residence

Margulies moves to suppress evidence seized from his residence on the grounds that (1) the search warrant for his residence was facially defective in its "fail[ure] to contain a finding of probable cause upon insufficient incorporation of the probable cause affidavit" (Margulies's Motion to Suppress ("Suppress. Br.") at 5), and (2) the Government, in executing the warrant, seized evidence from his residence beyond what was permitted by the search warrant. For the reasons set forth below, the Court should deny Margulies's motion to suppress evidence seized from the residence. The Court should also deny Margulies's request for a hearing regarding whether any of the Government's trial evidence was derived from the evidence seized pursuant to the search warrant that Margulies challenges.

I. Background

A. The Application, Affidavit and Search Warrant for the Residence

On or about October 10, 2017, based on an application (the "Application," attached hereto as Exhibit A), which included as an attachment an affidavit by Special Agent Tassone (the "Affidavit" or "Aff.," Attachment C to the Application), the Honorable Jeffrey S. Frensley, United States Magistrate Judge, Middle District of Tennessee, signed a search and seizure warrant (the "Search Warrant," attached hereto as Exhibit B), pursuant to Federal Rule of

Criminal Procedure 41(c), for a two-story brick residence in Murfreesboro, Tennessee (the "Residence"). The Application, including the Affidavit, and the Search Warrant were assigned Bates number ranges USAO_01_02340-02373 and USAO_01_02374-02377, respectively, and produced as Rule 16 discovery to Margulies, on or about November 22, 2017. (*See* Letter from AUSA Robert Allen dated November 22, 2017, attached hereto as Exhibit C.)

The Affidavit, which attached and incorporated by reference the Complaint (Aff. ¶ 4), set forth probable cause to believe that, from at least in or about August 2015 through in or about August 2017, Margulies, along with Bershan and Schwartz, engaged in securities fraud, conspired and attempted to commit securities fraud, engaged in wire fraud, and conspired and attempted to commit wire fraud (*id.* ¶ 5). Both the Affidavit and the Complaint focus on fraudulent activity in connection with Starship. However, the Complaint also set forth fraudulent conduct undertaken by Margulies and his co-conspirators in connection with All American Pet Company. For example, the Complaint stated:

> In or about 2012 or 2013, Victim-1 invested approximately $160,000 to $180,000 in AAPC, which … was controlled by LISA BERSHAN, BARRY SCHWARTZ, and JOEL MARGULIES, the defendants. Based on my conversations with Victim-1, I understand that Victim-1 invested in AAPC based on representations by BERSHAN and SCHWARTZ that AAPC's product would be in tens of thousands of stores within months and was already in production. By in or about 2015, however, Victim-1 understood that Victim-1's investment in AAPC was valueless, and that AAPC was no longer conducting active business operations (to the extent it ever did). In or about May 2015, BERSHAN told Victim-1 that BERSHAN was no longer involved in AAPC and was instead developing a caffeinated snack.

(Compl. ¶ 11).

The Search Warrant itself consisted of four pages: a one-page warrant signed by Judge Frensley that incorporated Attachments A and B, a one-page Attachment A that described the premises to be search, and a two-page Attachment B that described the

items to be seized. (Ex. B). The warrant itself states, in pertinent part: "I find that the affidavit(s) … establish probable cause to search and seize the person or property described [in Attachment A], and that such search will reveal … See Attachment B." Attachment B, entitled "Items to be Seized," consists of three subparts:

A. Evidence, Fruits, and Instrumentalities of the Subject Offenses ("Attach. B, Sub. A");

B. Search and Seizure of Electronically Stored Information ("Attach. B, Sub. B"); and

C. Review of ESI ("Attach. B, Sub. B").

(Ex. B).

Subpart A sets forth that the items to be seized from the Residence "include the following evidence, fruits, and instrumentalities of securities fraud, in violation of Title 15, United States Code, Section 78j(b) and 78ff; wire fraud, in violation of Title 18, United States Code, Section 1343; and conspiring and attempt to commit the same (the 'Subject Offenses') described as follows …." (Attach. B, Sub. A). Immediately thereafter follow five categories of evidence, fruits, and instrumentalities that may be seized by the agents executing the search (the "Categories"):

1. Financial records, communications, and documents created between in or about August 2015 and the date of this Warrant relating to the receipt, transfer, or disposition of investments in The Awake Company or Starship Snacks Inc.

2. Communications and documents constituting a crime, such as communications to investors in Starship sent between August 2015 and the date of this Warrant containing misrepresentations regarding, or fraudulent guarantees of, their investments.

3. Communications and documents reflecting preparation for the Subject Offenses, such as documents reflecting the creation of stock certificates for The Awake Company or Starship Snacks, Inc., or the incorporation of these entities.

4. Communications between in or about August 2015 and the date of this Warrant relating to state of mind of Lisa Bershan, Joel Margulies, or Barry Schwartz, such as communications with co-conspirators; and

5. Computers, including tablet computers, electronic storage devices, cellular telephones, and other electronic devices that may be used to access the internet, which devices may be searched for the materials described above in Paragraphs 1 through 4.

(*Id.*).

Subpart B specifies, in relevant part, that "[t]he items to be seized from [the Residence] also include any computer devices and storage media that may contain any electronically stored information falling within the categories set forth in Section II.A of this Attachment above …." (*Id.*)[2]

B. Execution of the Search Warrant

On or about October 11, 2017, the day of Margulies's arrest, FBI Special Agents executed the Search Warrant at the Residence. The items that were seized consisted principally of: (1) a white powdery substance that field tested positive for cocaine and drug paraphernalia; (2) a Samsung Galaxy smartphone and an Alcatel mobile "flip" phone; (3) two laptop computers, a tablet computer, and an external hard drive; (4) stock certificates and documents related to Lisa Bershan; (5) a planner with contact information for individuals and entities; (6) documents related to Starship Snacks; (7) 2015 and 2016 tax returns; (8) documents related to All American Pet Company; (9) pet food bars; and (10) correspondence from financial institutions. (A copy of the Search Warrant return is attached as Exhibit D.) A cursory review of the documents was done on-site, and a more detailed document-by-document responsiveness review was conducted

[2] The only natural reading of the "categories set forth" in "this Attachment above" are the five Categories in Subpart A. (*Id.*) Thus, the reference to "Section II.A of this Attachment above" appears to be an error; it should read "Section A of this Attachment above." (*Id.*)

off-site. The electronic devices were seized and subject to an off-site forensic examination and determination regarding the responsiveness of the materials stored on them.

C. Margulies's Arrest and Post-Arrest Interview

After his arrest at the Residence, Margulies was transported by FBI agents to the FBI field office, where Margulies was verbally advised of his *Miranda* rights and presented with a written waiver of rights form. Margulies executed the waiver and answered questions put to him by the agents. While Margulies was being interviewed, other FBI agents conducted the search of his residence. The interview was recorded. A copy of the recording and draft transcripts of the recording were provided to Margulies as Rule 16 discovery. The Government's final version of the transcripts was provided to Margulies on or about May 22, 2019.

II. Argument

A. The search warrant was facially valid.

Margulies argues that the Search Warrant was defective as it "failed to contain a finding of probable cause based upon insufficient incorporation of the probable cause affidavit." (Margulies's Motion to Suppress Evidence from Search Warrant, "Suppress. Br." at 5). As a remedy, Margulies "seeks suppression of all evidence" seized pursuant to the Search Warrant. *Id.* This claim is meritless and should be rejected.

1. *Applicable Law*

Pursuant to the Fourth Amendment, a warrant must "particularly describ[e] the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. A warrant must therefore (1) "identify the specific offense for which the police have established probable cause"; (2) "describe the place to be searched"; and (3) "specify the items to be seized by their relation to

the designated crimes." *United States v. Galpin*, 720 F.3d 436, 445-46 (2d Cir. 2013) (internal quotation marks and citation omitted).

2. *Discussion*

In this case, the Search Warrant met each of the requirements set forth in *Galpin*. First, it "identif[ied] the specific offense for which the police have established probable cause," namely, "securities fraud, in violation of Title 15, United States Code, Section 78j(b) and 78ff; wire fraud, in violation of Title 18, United States Code, Section 1343; and conspiring and attempt to commit the same …." (Ex. B, Attach. B. Sub. A). Second, the Search Warrant "describe[d] the place to be searched," namely, "a two-story brick residence located at the address [redacted], Murfreesboro, Tennessee 37130." (Ex. B, Attach. A). Third, the Search Warrant "specif[ied] the items to be seized by their relation to the designated crimes"; these are set forth in "Attachment B, Items to be Seized." Nothing more is required.

Moreover, Margulies does not argue that the warrant lacks particularity with respect to the three prongs of *Galpin*. Instead, he conjures from thin air a fourth prong, "an establishment of probable cause," that he claims must be "state[d]" on the warrant itself (Suppress. Br. at 5) or, in the alternative, be incorporated into the warrant (*id.* at 10). There is no support in the law for such a requirement. Margulies's argument appears to derive from a mischaracterization of the Second Circuit's opinion in *In re 650 Fifth Avenue.* In that case, the Second Circuit considered a Fourth Amendment challenge to a search warrant that "[o]n its face, … plainly lacked particularity as to the crimes at issue" and that did not "particularize categories of computerized information for which there was probable cause to seize, or the temporal scope of the materials that could be seized." *In re 650 Fifth Ave. & Related Properties*, 830 F.3d 66, 100 (2d Cir. 2016). Because – and only because – the Court found that the warrant itself lacked particularity

with respect to the crimes at issue and the categories of evidence that could be seized, did the Court consider the contents of the supporting affidavit, on the theory that "a court may construe a warrant with reference to a supporting application or affidavit if the warrant uses appropriate words of incorporation, and if the supporting document accompanies the warrant." *Id.* at 99-100 (quoting *Groh v. Ramirez*, 540 U.S. 551, 557-58 (2004)). In so doing, the Court was ascertaining whether an otherwise facially-deficient warrant could be salvaged by the additional particularity provided by a supporting document properly incorporated into the warrant.

But those facts are readily distinguishable from the facts of this case. Here, the Search Warrant satisfied the three particularity requirements, and there is no reason for the Court to examine any supporting documents to determine whether they provide additional particularity, nor to determine whether such supporting documents were properly incorporated into the warrant itself. Margulies's discussion of these topics is beside the point, as the Search Warrant, standing on its own, is sufficiently particular.

B. In the alternative, the seized evidence is admissible pursuant to the good faith exception to the exclusionary rule.

Even if the Search Warrant were facially defective as alleged by Margulies – which it is not – the good faith exception to the exclusionary rule would apply.

1. *Applicable Law*

The remedy of excluding evidence "exacts a heavy toll on both the judicial system and society at large" by requiring "courts to ignore reliable, trustworthy evidence bearing on guilt or innocence," and "its bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment." *Davis v. United States*, 564 U.S. 229, 237 (2011) (internal citations omitted). Accordingly, suppression is a remedy of "last resort." *Id.* It is appropriate only when necessary to deter deliberate police misconduct. *Id.* at 237-40, 246;

United States v. Leon, 468 U.S. 897, 916 (1984). Courts should not "suppress evidence obtained as a result of nonculpable, innocent police conduct." *Davis*, 564 U.S. at 240. "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." *Herring v. United States*, 555 U.S. 135, 144 (2009).

The logic of the "good faith exception" to the exclusionary rule is simple: "the nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion." *Leon*, 468 U.S. at 922; *see also United States v. Ross*, 456 U.S. 798, 823 n.32 (1982) ("a warrant issued by a magistrate normally suffices to establish" that an agent has "acted in good faith in conducting the search"). This is because the application of the exclusionary rule is "particularly" inappropriate when "an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope." *Leon*, 468 U.S. at 920. "In most such cases, there is no police illegality and thus nothing to deter." *Id.* at 920-21. Once a judge signs a warrant, "there is literally nothing more the policeman can do in seeking to comply with the law." *Id.* at 921. If officers are objectively reasonable in relying upon a warrant, suppression should be denied even if the warrant is subsequently invalidated. *Id.* at 922.

Although the Government carries the burden to demonstrate the objective reasonableness of the officers' good faith reliance on an invalidated warrant, the Supreme Court has "signaled that most searches conducted pursuant to a warrant would likely fall within this [good faith] protection." *United States v. Clark*, 638 F.3d 89, 100 (2d Cir. 2011) (quoting *Leon*, 468 U.S. at 922). This "presumption of reasonableness" applies unless: (1) the issuing magistrate has been knowingly misled; (2) the issuing magistrate wholly abandoned his or her judicial role; (3) the

application is so lacking in indicia of probable cause as to render reliance upon it unreasonable; or (4) the warrant is so facially deficient that reliance upon it is unreasonable. *Clark,* 638 F.3d at 100 (internal quotation marks and citation omitted).

2. *Discussion*

In this case, Margulies does not argue that the magistrate judge was knowingly misled, that he wholly abandoned his judicial role, or that the application was so lacking in indicia of probable cause as to render reliance upon it unreasonable. *See id.* Rather, Margulies claims that the Search Warrant was so facially deficient that reliance upon it was unreasonable. *See id.* The basis of Margulies's motion is the Search Warrant's "failure to include incorporating language." (Suppress. Br. at 12). In arguing that the good faith exception does not apply, Margulies further alleges that "[t]he failure would have been obvious to any law enforcement officer trained in the basics of search warrant requirements." (*Id.*)

As explained above, the alleged "failure" to include incorporating language is not actually a failure. There is no *per se* rule that a search warrant must incorporate an affidavit, application, or any other document, as long as the search warrant itself satisfies the three particularity requirements of *Galpin*. Because Margulies's claim that the Search Warrant was defective for not incorporating other documents has no basis in law, the agents in this case cannot be faulted for relying on the Search Warrant. Under *Clark*, the "presumption of reasonableness" applies, and thus the exclusionary rule should not be applied in this case.

For these reasons, Margulies's motion to suppress based on the alleged facial deficiency of the Search Warrant should be denied.[3]

[3] In addition, Margulies's facial challenge to the Search Warrant is not timely, as Margulies has been in possession of the Application and the Search Warrant since approximately November 22, 2017. A facial challenge to a Search Warrant, such as the one now brought by Margulies, is

C. The Government did not seize evidence outside the scope of the warrant.

Margulies incorrectly cabins the scope of the Search Warrant, by claiming that "[t]he search was limited to documents dated from August 1, 2015 to the date of the warrant and which were relevant to the Awake / Starship alleged schemes." (*Id.*) Based on that erroneous characterization of the categories of evidence subject to seizure, Margulies argues that "the Government searched for and seized documents prior to August 1, 2015 and which did not relate to the Awake Company / Starship alleged scheme, and thereby exceeded the lawful authority of the search warrant." (*Id.*) Margulies does not provide any examples of documents that he claims fall outside the scope of the Search Warrant. He merely alleges that "much of the seized evidence falls beyond the scope of the warrant and should be suppressed on that basis." (Suppress. Br. 13). He also faults the Government for not employing certain search techniques to limit the universe of electronic documents that were viewed by the agents conducting the search. (*Id.* at 16). However, Margulies's reading of the Search Warrant is flawed, both in terms of the evidence subject to seizure and the techniques permissible to conduct the search, and there is no basis to suppress any of the evidence that the Government seized as a result of the execution of the Search Warrant. This motion should be denied.

1. *Applicable Law*

The scope of a search warrant should be subject to a "common sense reading." *United States v. Salameh*, 54 F. Supp. 2d 236, 277 (S.D.N.Y. 1999) (Duffy, J.), *aff'd*, 16 F. App'x 73 (2d Cir. 2001).

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independent from the execution of the Search Warrant or the evidence seized pursuant to the Search Warrant. Margulies filed other motions, including a motion to sever, in April 2018. (ECF Doc. 48-50). Margulies offers no reason to justify his delay in filing a facial challenge to a Search Warrant that has been in his possession for approximately 18 months.

> If the scope of a search exceeds that permitted by the terms of the underlying warrant, the subsequent seizure is unconstitutional. Officials executing a warrant have some discretion, however, in interpreting the scope of the warrant. Their interpretation of the scope of the warrant need not be hyper-technical, but rather should be commonsensical.

Id. (citations and internal quotations omitted). The more complex the crimes under investigation, the broader the categories of documents and records that may properly be seized. *See, e.g.*, *United States v. Jacobson*, 4 F. Supp. 3d 515, 526 (E.D.N.Y. 2014) (concluding that the breadth of the warrant, which contained no timeframe limitation, was justified because "the crimes under investigation were complex and concerned a long period of time, not simply one or two dates of criminal activity"); *United States v. Levy*, No. S5 11 CR. 62 PAC, 2013 WL 664712, at *7-*10 (S.D.N.Y. Feb. 25, 2013) (Crotty, J.), *aff'd*, 803 F.3d 120 (2d Cir. 2015) (discussing how the broad warrant with no timeframe limitation was justified by breadth and complexity of fraud described in underlying affidavit); *United States v. Dupree*, 781 F. Supp. 2d 115, 149 (E.D.N.Y. 2011) (describing how "[t]he nature of the crime . . . may require a broad search," such as where "complex financial crimes are alleged"). Indeed, "[w]here, as here, complex financial crimes are alleged, a warrant properly provides more flexibility to the searching agents," *Dupree*, 781 F. Supp. 2d at 149, and "it may be appropriate to use more generic terms to describe what is to be seized," *United States v. Gotti*, 42 F. Supp. 2d 252, 274 (S.D.N.Y. 1999). When a search warrant limits the scope of the search to evidence of particular federal crimes, and gives an "illustrative list of seizable items," the search warrant is sufficiently particular. *United States v. Riley*, 906 F.2d 841, 844-45 (2d Cir. 1990). Furthermore, "it is generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search warrant—subject, of course, to the general Fourth Amendment protection against

unreasonable searches and seizures." *United States v. Lumiere*, No. 16 CR. 483, 2016 WL 7188149, at *5 (S.D.N.Y. Nov. 29, 2016) (Rakoff, J.) (quoting *Salameh*, 54 F. Supp. 2d at 277).

2. *Discussion*

Margulies is mistaken when he claims that "[t]he search was limited to documents dated from August 1, 2015 to the date of the warrant and which were relevant to the Awake Company / Starship alleged scheme." (Suppress. Br. at 14). A review of the five categories of evidence set forth in Attachment B, Subpart A, *see supra*, reveals the error of Margulies's overly-narrow reading. The second category ("Category 2") authorizes the seizure of "[c]ommunications and documents constituting a crime, *such as* communications to investors in Starship sent between August 2015 and the date of this Warrant containing misrepresentations regarding, or fraudulent guarantees of, their investment." (emphasis added) (Ex. B, Attach. B, Sup. A.2). The introductory paragraph makes clear that "crime" refers to the Subject Offenses, which are defined in that paragraph as securities fraud, wire fraud, and conspiring and attempting to commit the same. Thus, Category 2 permits the seizure of communications and documents constituting one of the Subject Offenses, *such as* communications sent to Starship investors between August 2015 and the date of the Warrant. The time frame in this category of evidence functions merely as an example of the types of fraudulent communications and documents that the agents could expect to find. The words "such as" are equivalent to "including but not limited to." Category 2 plainly contemplates that communications and documents constituting a Subject Offense—including those that predated August 2015—will be seized by the reviewing agents.

Margulies also misinterprets the third category of items to be seized ("Category 3"), namely, "[c]ommunications and documents reflecting preparation for the Subject Offenses, *such as* documents reflecting the creation of stock certificates for The Awake Corporation or Starship

Snacks, Inc., or the incorporation of these entities." (Ex. B, Attach. B, Sub. A) (emphasis added). Category 3 contains no explicit temporal limitation, which is logical: it is likely that steps to prepare for the Subject Offenses were taken *before* the Subject Offenses themselves were committed.[4] Similarly, Category 3 is not limited in subject matter to communications and documents that reference the fraud in connection with the Awake Company or Starship Snacks, but also includes communications and documents that reflect the preparatory steps taken by Margulies and his co-conspirators to commit these frauds.

Additionally, in reviewing the Search Warrant, it is important to bear in mind that the contours of the AAPT fraud scheme – which pre-dated, overlapped with, and post-dated the Starship fraud scheme – were coming into focus for the agents at the time the Affidavit was drafted. The Complaint, which is incorporated into the Affidavit, discussed the AAPT fraud, noting that AAPT, like Starship, was controlled by Margulies, Schwartz and Bershan. (Compl. ¶ 11). The Complaint recounts the experience of Victim-1, who invested approximately $160,000 to $180,000 in AAPC in 2012 and 2013. (*Id.*) Beginning in around May 2015, Victim-1 was told that AAPC had gone out of business and that the defendants were working on a caffeinated snack business instead. (*Id.*) Based on misrepresentations about Bershan's purported wealth and Monster's purported interest in acquiring Starship, Victim-1 invested approximately $25,000 in Starship. (*Id.*). After the defendants drafted a "share price guarantee," pursuant to which Bershan agreed to personally guarantee investments in Starship, Victim-1 referred approximately $200,000 of investments to Starship. (*Id.*)

[4] However, Category 3 is nevertheless limited in time, as it reaches back only as far as the defendants' plans to commit the Subject Offenses.

By the time the Search Warrant was executed, in addition to having interviewed Victim-1, the agents had also interviewed other victims of the AAPT fraud. The allegations of fraud that the agents heard with respect to AAPT were similar to the allegations of fraud set forth in the Complaint with respect to Starship, for example, misappropriation of investor funds, lies about wealth, and fraudulent inducements.

Accordingly, even assuming that the search warrant limited the Government to seizing only evidence relating to the Starship scheme, evidence regarding Margulies's involvement in AAPT is, in fact, directly relevant to his state of mind with respect to the Starship fraud, and thus AAPT-related evidence was appropriately seized, notwithstanding the temporal limitations of some of the categories. By way of example, the Complaint described one of the fraudulent misrepresentations made to AAPT investors, namely, that the company's product "would be in tens of thousands of stores within months and was already in production," (*id.*), which is very similar to the fraudulent misrepresentation made to Starship investors in December 2016 that Starship "will be on the shelf with [] products in the first quarter of 2017," (*id.* ¶ 12(a)(vi)). Just as the AAPT scheme failed, Margulies, Bershan, and Schwarz abandoned AAPT and instead turned to "developing a caffeinated snack," which in reality meant launching the Starship fraud. (*Id.* ¶ 11).

The Supreme Court's analysis of a similar factual situation in *Andresen v. Maryland*, 427 U.S. 463 (1976), is instructive here. In *Andresen*, a local law enforcement investigation uncovered evidence that the petitioner, a real estate attorney, had engaged in fraud in connection with a transaction involving a particular parcel of land, "Lot 13T" in the Potomac Woods subdivision. *Id.* at 465-66. Law enforcement officers obtained warrants to search the petitioner's offices for specified documents pertaining to the sale and conveyance of Lot 13T. *Id.* at 466. The

petitioner was charged with the state crime of false pretenses, based on his misrepresentation to the buyer of Lot 13T, and with fraudulent misappropriation by a fiduciary, based on similar false claims made to three home purchasers. *Id.* at 467. The petitioner sought to suppress documents seized during the searches that pertained to subdivision lots other than Lot 13T, on the ground that the documents "were not relevant to the Lot 13T charge and were admissible only to prove another crime with which he was charged after the search." *Id.* at 482. The petitioner argued that "the fact that these documents were used to help form the evidentiary basis for another charge … shows that the documents were seized solely for that purpose." *Id.* The Supreme Court rejected the petitioner's argument and affirmed the admissibility of documents that did not pertain to Lot 13T, explaining that:

> [W]hen the special investigators secured the search warrants, they had been informed of a number of similar charges against petitioner arising out of Potomac Woods transactions. And, by reading numerous documents and records supplied by the Lot 13T and other complainants, and by interviewing witnesses, they had become familiar with petitioner's method of operation. Accordingly, the relevance of documents pertaining specifically to a lot other than Lot 13T, and their admissibility to show the Lot 13T offense, would have been apparent. Lot 13T and the other lot had numerous features in common. Both were in the same section of the Potomac Woods subdivision; both had been owned by the same person; and transactions concerning both had been handled extensively by petitioner. Most important was the fact that there were two deeds of trust in which both lots were listed as collateral. Unreleased liens respecting both lots were evidenced by these deeds of trusts. Petitioner's transactions relating to the other lot, subject to the same liens as Lot 13T, therefore, were highly relevant to the question whether his failure to deliver title to Lot 13T free of all encumbrances was mere inadvertence. Although these records subsequently were used to secure additional charges against petitioner, suppression of this evidence in this case was not required. The fact that the records could be used to show intent to defraud with respect to Lot 13T permitted the seizure . . . .

Id. at 484.

Similarly, in this case, Margulies is expected to argue, among other things, that he was not aware that the representations he made to Starship investors were false and fraudulent. For example, in 2015 and 2016, Margulies represented that investments in Starship were guaranteed against losses by the assets of Bershan. (S2 Indict. ¶ 17). The Government anticipates that Margulies will argue that the Government has not proven that Margulies knew those claims to be false when he made them. Yet documents seized from the Residence pursuant to the Search Warrant paint a very clear picture of Margulies's knowledge and state of mind at the time he made those representations. In connection with his participation in the earlier portion of the AAPT fraud, from approximately 2013 through 2015, Margulies himself had created or, at the very least, possessed, numerous fake documents purporting to prove Bershan's wealth and lack of indebtedness. These documents include:

1. A letter dated October 30, 2013, purportedly from a branch of Deutsche Bank in Geneva to Bershan, verifying that Bershan has inherited from her parents an account worth at least $5 million. ("Deutsche Bank Letter," attached hereto as Exhibit E.) This document was found on Margulies's computer both as a PDF entitled "false letter from Deutsche Bank sent to Mary L.pdf" saved in a folder entitled "Lisa\Inheritance" as well as Word documents (one with the file name "DEUTSCHE BANK.docx" and the other with the file name "DEUTSCHE BANK 5.5.16.docx") in a folder entitled "All American Pet\bow wow\AAP documents."

2. An undated letter purportedly from "H. Amanurtri" at the IRS to Schwartz, accepting the "offer in compromise" that AAPT had made to settle the outstanding amount it owed the IRS. ("IRS Amanutri Letter," attached hereto as Exhibit F.) Two slightly different versions of this document (the formatting of the first line differs) were found in hard copy in the Residence, along with the first page of an authentic letter from the IRS which rejected AAPT's offer in compromise. The Government expects the evidence at trial to show that the IRS never accepted an offer in compromise from AAPT, and that "H. Amanutri" was not an IRS employee.

3. A letter dated September 19, 2014, purportedly from an IRS employee, accepting the offer in compromise that AAPT had made to the IRS ("IRS K.R. Letter," attached hereto as Exhibit G), was found on Margulies's computer as a PDF in a folder called "Lisa\Financial." As set forth *supra*, the Government

> expects the evidence at trial will demonstrate that the real IRS employee, "K.R.," did not author the letter in question, and did not authorize the conspirators to use her name or signature in any way.

Each of the three above-referenced documents (collectively, the "Fake Letters"), recovered from the search of the Residence pursuant to the Search Warrant, are encompassed by Category 2 – communications and documents constituting a Subject Offense – as the Fake Letters are themselves fraudulent communications and documents. They also fall within the Search Warrant's Category 3 – communications and documents reflecting preparation for the Subject Offenses. The Fake Letters were, on their face, evidence of preparation for the Starship fraud, as they purported to be proof of Bershan's wealth and solvency, about which the conspirators made numerous misrepresentations in connection with both the Starship scheme and the AAPT scheme.

Additionally, these documents bear directly on Margulies's knowledge and state of mind with respect to the fraudulent misrepresentations he and his co-defendants later made to Starship investors regarding Bershan's ability to guarantee their investments. At a minimum, the Fake Letters are evidence that Margulies knew that Bershan was not the recipient of a multi-million-dollar inheritance, that the IRS had rejected AAPT's offer in compromise, and that AAPT still owed the IRS a substantial amount of money. As in *Andreson*, this evidence is "highly relevant" to the question whether Margulies's making of false statements to investors "was mere inadvertence." 427 U.S. at 482. Similarly, suppression is not warranted in this case because, as *Anderson* states: "[t]he fact that the records could be used to show intent to defraud permitted the seizure . . . ." (*Id.*)

Furthermore, the Search Warrant yielded proof of Margulies's knowledge that Monster's alleged interest in acquiring Starship was a fabrication. By early 2016, Margulies and Bershan

were orchestrating the Starship fraud, while at the same time reviving the AAPT fraud with misrepresentations that were strikingly similar to those made in the Starship scheme. Margulies knowingly participated in both schemes. The evidence recovered from Margulies's electronic devices shows that Margulies, by that time, was creating fake documents, purporting to show Nestlé's interest in acquiring AAPT, using language and concepts that bore a strong resemblance to Margulies's lies about Monster's alleged interest in Starship. For example, on Margulies's computer, in a folder entitled "Awake\Nestle," is a Word document that appears to be a presentation to AAPT investors about Nestlé's interest in acquiring AAPT's dog food patent. Included within the presentation, also in Word format, is a letter dated April 20, 2016, purportedly from a Nestlé employee to Margulies, claiming that "[f]rom the first moment we saw the All American Pet Company dog food bars we envisioned the development of an entirely new brand architecture for a pet category that would sit between food and snacks as functional treats." ("Fake Nestlé Letter," attached hereto as Exhibit H). The Government anticipates that the Nestlé employee whose name and signature appear on the letter will testify that she did not write the letter, and has never communicated with Margulies. Moreover, the exaggerated enthusiasm of the Fake Nestlé Letter mirrors the supposedly overwhelming enthusiasm with which Monster reacted to Starship's line of caffeinated snacks.

Furthermore, the Fake Letters and the Fake Nestlé Letter show the relationship of trust between Margulies and his co-conspirator, Bershan. For example, the Deutsche Bank Letter, which was found on Margulies's computer and bears indicia of having been created by Margulies, purports to be addressed to Bershan and to concern an account that Bershan was supposedly to going to inherit. The fact that Margulies was creating fake documents for the benefit of Bershan is highly relevant to proving the trust these conspirators had in one another. In

a conspiracy case, other acts evidence is admissible "to demonstrate the existence of a relationship of mutual trust," among other things. *United States v. Riley*, No. 13 Cr. 339 (VEC) 2014 WL 3435721, *4 (S.D.N.Y. July 14, 2014) (Caproni, J.); *see also United States v. Mermelstein*, 487 F. Supp. 2d 242, 262 (E.D.N.Y. 2007) ("[E]vidence of the nature of the relationship between alleged co-conspirators is frequently admitted by courts.").

Lastly, Margulies's argument fundamentally mischaracterizes the evidence review process authorized by the Search Warrant, which does not require the Government to use particular search techniques to limit the date range of the documents to be reviewed. (Suppress. Br. at 16, arguing that the Government should have "run a scan to pull only documents created on or after August 1, 2015.") First, as explained above, the five Categories of evidence subject to seizure were not all limited to documents created on or after August 1, 2015. Second, the "Review of ESI" section of the Search Warrant specifically permits law enforcement to, among other things, "open[] or cursorily read[] the first few 'pages' of [individual] files in order to their precise contents" and "perform[] electronic keyword searches through all electronic storage areas to determine whether occurrences of language contained in such storage areas exist that are intimately related to the subject matter of the investigation." (Ex. B, Attach. B, Sub. C).

D. In the alternative, the evidence is admissible under the plain view doctrine.

In the event that the Court were to determine that agents exceeded the scope of the Search Warrant in seizing certain items that pre-dated August 1, 2015 or were not directly related to the Starship Scheme, those items would still be admissible pursuant to the plain view doctrine.

1. *Applicable Law*

The Supreme Court has long recognized the "applicability of the 'plain view' doctrine [to] the situation in which the police have a warrant to search a given area for specified objects, and in the course of the search come across some other article of incriminating character." *Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971) (Stewart, J.) (plurality opinion). Under the plain view exception, "if police are lawfully in a position from which they view an object, if its incriminating character is immediately apparent, and if the officers have a lawful right of access to the object, they may seize it without a warrant." *Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993). "If an article is already in plain view, neither its observation nor its seizure would involve any invasion of privacy." *Horton v. California*, 496 U.S. 128, 133 (1990). The Second Circuit has held that "under the plain view doctrine[,] the incriminating nature of an object is generally deemed 'immediately apparent' where police have probable cause to believe it is evidence of crime," and that officers "may test their belief by proceeding with a limited inspection of the 'incriminating object.'" *United States v. Ochs*, 595 F.2d 1247, 1258 (2d Cir. 1979). The First Circuit has similarly defined "immediately apparent" as "sufficient to constitute probable cause to believe it is evidence of criminal activity," meaning "there must be enough facts for a reasonable person to believe that the items in plain view may be contraband or evidence of a crime," and noting that "a practical, nontechnical probability that incriminating evidence is involved is all that is required." *United States v. Hamie*, 165 F.3d 80, 82–83 (1st Cir. 1999).

Moreover, the Supreme Court has rejected the proposition that a plain-view seizure must be inadvertent. "[E]ven though inadvertence is a characteristic of most legitimate "plain-view" seizures, it is not a necessary condition." *Horton*, 496 U.S. 128 at 130. If an officer "has a valid

warrant to search for one item and merely a suspicion concerning the second, whether or not it amounts to probable cause, we fail to see why that suspicion should immunize the second item from seizure if it is found during a lawful search for the first." *Id.* at 139.

2. *Discussion*

As set forth in the Complaint and explained more fully *supra*, at the time the agents sought and executed the Search Warrant, they were already aware of, and had suspicions concerning, the defendants' involvement in AAPT. They had interviewed a number of victims who had invested substantial sums in AAPT, only to be told that AAPT would be shut down and that the defendants were working on a new concept, which would come to be known as Starship. The agents suspected that the defendants had made misrepresentations regarding Bershan's wealth to AAPT investors similar to those they made to Starship investors. Thus, when the agents executing the search warrant reviewed the Fake Letters, their incriminating nature was immediately apparent. The Deutsche Bank Letter on its face looks like a forgery – there is no author or signature, for example.[5] Moreover, the Amanutri IRS Letter – purportedly accepting AAPT's offer in compromise – was discovered along with a portion of an authentic IRS letter that rejected AAPT's offer in compromise; this discrepancy alone establishes probable cause that the Amanutri IRS Letter is evidence of criminal activity. With respect to the Fake Nestlé Letter, the executing agents were aware that the defendants had relied on misrepresentations regarding Monster's interest in Starship to attract investors. In light of that awareness, a bizarrely-worded letter from Nestlé claiming a similar interest in AAPT is suspicious enough to warrant seizure under the plain view doctrine.

[5] In addition, at the time the Search Warrant was executed, the FBI agents had already come into possession of two other Deutsche Bank letters purporting to verify Bershan's multi-million dollar inheritance, and had confirmed with Deutsche Bank that the letters were forgeries.

In sum, the cache of fake and forged documents discovered as a result of the execution of the Search Warrant is admissible under the plain view doctrine, and Margulies's request to suppress these and similar documents should be rejected.

PART TWO

Margulies's Motions in Limine

I. Margulies's Motion Related to Opinion Testimony

Margulies moves *in limine* to prohibit five categories of opinion statements. (ECF Doc. 141). The motion is meritless and should be denied.

A. Witness opinions using language found in criminal statutes or charges are not *per se* inadmissible.

The Court should deny Margulies's motion to preemptively bar any opinion testimony that uses language tracking that of the criminal statute. To support his claim, Margulies cites one case: *United States v. Scop*, 846 F.2d 136 (2d Cir. 1988). Margulies reads *Scop* to prohibit "us[ing] . . . language tracking the applicable statutes to give an opinion regarding guilt." (ECF Doc. 141, at 3). This reading is inconsistent with *Scop* and its progeny.

Scop itself involved an SEC investigator who testified as an expert in a market manipulation case. *See Scop*, 846 F.2d at 138. The witness in that case "consciously used the same formulation throughout his testimony," even "correct[ing] himself in mid-sentence" to include the language of the statute rather than slightly different wording. *Id*. The Second Circuit found that these statements, which "made no attempt to couch the opinion testimony at issue in even conclusory factual statements" amounted to "legal conclusions that . . . went well beyond his province as an expert." *Id.* at 140. Because of this, the expert opinion "could not have been helpful to the jury in carrying out its legitimate functions." *Id.* The Court further found that had the expert witness "merely testified that controlled buying and selling of the kind alleged here

can create artificial price levels to lure outside investors, no sustainable objection could have been made." *Id.* Nothing in *Scop* implies that mere use of statutory language is sufficient to render testimony related to criminal elements inadmissible. Indeed, the Second Circuit has declined to apply *Scop* where the testimony "does not present the dangers" of that case. *United States v. Duncan*, 42 F.3d 97, 101-02 (2d Cir. 1994) (distinguishing *Scop* in part by noting that in *Duncan* the relevant language was tracked only once, and that the expert had personal knowledge of the facts).

Instead, whether such testimony would amount to an impermissible legal conclusion is a context-specific inquiry. The language of testimony related to a legal element cannot be "viewed in isolation," which may make it appear to "lie[] near the border" of admissibility even when in reality, "when examined in the proper context, it does not cross the line." *Fiataruolo v. United States*, 8 F.3d 930, 941-42 (2d Cir. 1993) (admitting an expert's testimony that the defendant was a "responsible person" under 26 U.S.C. § 6672). By "providing factual explanations" and "couch[ing] his opinion specifically 'on the evidence that I looked at and the work that I did,'" the expert in *Fiataruolo* "gave the jury helpful information beyond a simple statement on how its verdict should read." *Id.* at 942. That was not the case in *Scop*, which instead involved "a simple bald assertion of the law." *Id.* (citing *Scop*, 846 F.2d 136). Experts can, without "testif[ying] as to whether the defendant . . . violated [a] statute . . . opine[] that a defendant's activity was 'illegal.'" *United States v. Mandell*, 752 F.3d 544, 551 (2d Cir. 2014). They can answer hypothetical applications of law to fact without "usurping the jury's function of applying the law to the facts of the case." *United States v. Blizerian*, 926 F.2d 1285, 1294 (2d Cir. 1991). And they are "uniquely qualified" to "guid[e] the trier of fact through a complicated morass of obscure terms and concepts." *Duncan*, 42 F.3d at 101.

Scop does not empower Margulies to prohibit the use of any words mirroring those of the underlying statute. To do so would be to undermine experts' ability to "help the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702(a). Accordingly, the motion should be denied.

B. Margulies's rationales for excluding testimony alleging the commission of a fraud or scheme to defraud are meritless.

Margulies moves to exclude any opinion testimony regarding the commission of a fraud or scheme to defraud. While the Government does not intend to elicit any pure conclusions of law from witnesses in this case, Margulies's request for a blanket prohibition on opinion testimony regarding the fraudulent conduct does not comport with the law.

Margulies first urges the Court to "find that such testimony offends due process" by reading into an isolated statement in *Scop* that, according to Margulies, "indicated [the Court] seems to be heading in that direction." (ECF Doc. 141 at 4). In reality, the *Scop* Court did exactly the opposite. Within just sentences of noting that certain expert opinions applying law to facts might be "offensive," the Second Circuit disclaimed any broad authority to weigh in on their propriety. 846 F.2d at 142 ("Whether these results are desirable is not for us to say in light of the Rules' generally liberated approach to expert testimony.").

That "approach to expert testimony" also defeats Margulies's second rationale, that opinions regarding whether "misrepresentations [were] made by Margulies and were they knowingly made . . . will be of no use or benefit to the jury." Margulies is free to cross-examine witnesses about opinions related to the falsity of Margulies's representations to investors. To achieve a blanket ban of opinion testimony alleging fraud under rules 701 and 702, however, Margulies must overcome the possibility that the opinion will be "helpful . . . to determining a fact in issue," Fed. R. Evid. 701(b); *see also* Fed. R. Evid. 702(a). Margulies erroneously claims

that opinion testimony in any form cannot at all "aid the jury in this case" because the questions of fact relate to only "simple lies in a very simple alleged scheme." The Government will be presenting elaborate, fact-intensive evidence of a multi-million-dollar financial scheme relating to investor funds received on the basis of fraudulent statements and the defendants' misappropriation of those funds. The Government intends to offer evidence that includes stock purchase agreements, loan agreements, investor communications, and bank account records for multiple corporate entities that will only be understood through detailed presentation of the evidence. In light of this complexity, it is not plausible to claim, as the defendant does, that "this case is not the type of case [in which] any opinion testimony should be admitted."

C. Margulies's motion to exclude testimony regarding his own credibility is inconsistent with the law.

Margulies, again citing *Scop*, asks to exclude any "[s]tatements that leave a clear impression with the jury that a Government witness does not believe the Defendant." (ECF Doc. 141 at 5). Margulies mentions as examples of such statements claims that "his story did not make sense to me" or "things did not add up." (*Id.*).

Margulies's legal citations do not support his argument. *Scop* held that "expert witnesses may not offer opinions on relevant events based on their personal assessment of the credibility of another witness's testimony [as] [t]he credibility of *witnesses* is exclusively for the determination by the jury." 846 F.2d at 142 (emphasis added). As an initial matter, the Government does not intend to offer expert testimony that relies on the expert's personal assessment of another witness's credibility. Even assuming that Margulies will be a witness in this case, *Scop*'s prohibition on "opin[ing] as to the credibility of the testimony of other witnesses at the trial" would not preclude witnesses from testifying about Margulies's earlier out-of-court statements used to perpetrate the fraud schemes. While testimony regarding the veracity or falsity of

Margulies's statements to investors will likely "leave the clear implication that the witness believes that the Defendant lied," (ECF Doc. 141 at 5), such testimony is not excludable on that basis. The issue of whether Margulies knowingly made false statements to investors is one of the central questions that will be addressed at trial. Excluding testimony reflecting a witness's belief that Margulies's out-of-court statements were false or misleading would prevent the jury from assessing the question at issue. Subject to the limits of the Federal Rules of Evidence, witnesses should not be barred from testifying about their assessment of Margulies's statements made in the course of the fraud.

D. Margulies's assertion that "a witness that testifies to a legal conclusion invades the province of the Court and the jury" does not constitute a cognizable motion.

Margulies asserts that "a witness that testifies to a legal conclusion invades the province of the Court and the jury." (ECF Doc. 141 at 5). The Government does not intend to elicit any pure conclusions of law from witnesses in this case. Nor does the Government read Margulies's motion, which requests no admission or exclusion of specific categories of evidence, as warranting any action from the Court at this time until particular testimony is elicited and a defense objection is made.

E. Margulies's assertion regarding expressions of personal opinion by the Government does not constitute a cognizable motion.

Margulies notes that any statements by the Government expressing "a personal opinion regarding the guilt or credibility of a defendant" or "indicating in any other way the Government has additional information not provided to the jury" would be improper. (ECF Doc. 141 at 4-5). Margulies acknowledges that "Defense Counsel has no reason to believe the Government Attorneys have any plans to make improper arguments." There is no basis for the Court to act on this motion.

II. Margulies's Motion Regarding Interrogation Statements and Cocaine

Margulies moves to exclude certain statements made by himself and agents after his arrest. None of Margulies's requests should be granted by the Court.

A. Evidence relating to Margulies's purchase, use, and distribution of cocaine

Margulies moves pursuant to Rule 403 to exclude from evidence at trial his post-arrest admissions that he possessed, used and arranged for the delivery of cocaine, as well as the cocaine and drug paraphernalia seized from the Residence pursuant to the plain view doctrine (collectively, the "Cocaine Evidence").

While the Government does not currently intend to offer the Cocaine Evidence in its case-in-chief, there are foreseeable circumstances in which Margulies may "open the door" to the admission of the Cocaine Evidence. For instance, as explained in Section III below, in his motion *in limine* regarding his employment at Key World Wide Foundation, Margulies argues that this employment left him "too busy and distracted" to be a knowing participant in the Starship and AAPT frauds. That argument, the Government submits, opens the door to the Cocaine Evidence. Another situation that may open the door for the Cocaine Evidence is if Margulies or his counsel advance the argument that Margulies's relationship to Bershan was merely one of an employee to an employer, and that he was not entrusted with the true facts of the scheme. In those circumstances, the Cocaine Evidence should be admitted to prove the true nature of the relationship of closeness and trust between Bershan and Margulies, which existed during the timeframe of both schemes and is therefore directly relevant to proving that Margulies was a knowing participant in both schemes. *See Mermelstein*, 487 F. Supp. 2d at 262. Evidence regarding Margulies and Bershan's willingness to engage in other criminal conduct with each other is thus highly probative to establish their relationship of trust, a relationship that undercuts

Margulies's argument that he was merely a mouthpiece for Bershan and that he was kept in the dark about the fraudulent nature of the two companies.

In sum, the Government respectfully requests that the Court defer ruling on this motion until it is clear whether the defendant opens the door to the Cocaine Evidence.

B. Margulies's statement that he confessed to "two crimes"

Margulies argues that his statement, made during the post-arrest interview, that "he has confessed to two crimes" should not be admitted. (ECF Doc. 140 at 3). Although the Government does not intend to offer that statement made by Margulies, it does intend to offer his confession regarding the illegal transfer of a firearm, which Margulies has not moved to exclude. The Government intends to offer, in relevant part, the portion of the recorded interview that is reflected in the transcript below:

TASSONE:	Did Lisa ever ask you to purchase a gun – to purchase a gun for her? Did you purchase a gun for her?
MARGULIES:	Yes.
TASSONE:	You did?
MARGULIES:	Yes.
TASSONE:	All right. When was that?
MARGULIES:	I can't give you the date, but I believe – it's more than six months.
. . . .	
TASSONE:	Did you purchase that gun for her under her name or your name?
MARGULIES:	My name.
TASSONE:	What kind? Do you not remember what kind of gun it is?
MARGULIES:	It's a sub-compact 380 and I don't remember the brand.
. . . .	
TASSONE:	Did Lisa say why she wanted you to purchase a gun for her?
MARGULIES:	She was afraid that people were going to shoot her. She had gotten threats from people and she had reported them to the police. She told me she reported them to the police. But there were investors

	that were threatening her. Meaning, I'm going to come and get you, I'm going to shoot you, I'm going to kill you, you know.
TASSONE:	Mm-hmm.
MARGULIES:	That's what she said that she had gotten. So, she was afraid.

With respect to Margulies's confession regarding his purchase, use and distribution of cocaine, the Government submits that this portion of the post-arrest interview may be relevant in the event that defense counsel offers certain evidence or makes certain arguments, for the reasons explained above. In the event that Margulies's statements regarding the cocaine are admitted into evidence, his statement reflecting that he confessed to "two crimes" should also be admitted.

C. Statements and questions regarding child pornography and legal pornography

Margulies moves to preclude the questions and responses regarding child and legal pornography from his post-arrest interview. The Government does not intend to elicit testimony or offer evidence regarding the discussions of child pornography and legal pornography that took place during that post-arrest interview.

D. Statements made by the agents during the interview

Margulies cites several examples of statements made by the FBI agents during the post-arrest interview to which he objects to under Rules 402 and 403, and asks the Court to bar statements for which "there is no evidence to support the conclusion or which state the personal opinion of the Agent." (ECF Doc. 140 at 3). Though the Government does not intend to offer any of the statements listed in Margulies's motion, or any similar statements by the agents, the Court should not grant Margulies's wholesale motion to exclude all statements of opinion by agents in this case. Margulies reiterates his argument from ECF Doc. 141, the motion to exclude certain opinion statements. For reasons stated in the Government's response to that motion, Margulies's

attempt to reincorporate the argument here should also be denied. There is no categorical bar under Rule 402 or 403 to statements of opinion by lay witnesses, including law enforcement agents. Indeed, the Federal Rules of Evidence explicitly allow for witnesses to express opinions helpful to the jury and "rationally based on the witness's perception." Fed. R. Evid. 701(a). The motion to entirely bar any "state[ments] [of] the personal opinion of the Agent" (ECF Doc. 140 at 3), has no basis in law and should be denied.

III. Margulies's Motion Regarding his Employment at Key World Wide Foundation

Margulies seeks to introduce evidence that "he was working full time outside of his work with the co-defendant's [sic] in this case," which he argues "is relevant because it shows that he was busy and distracted with other things." (ECF Doc. 142 at 2). Margulies also moves to bar the Government from introducing evidence that Margulies worked for the Key World Wide Foundation, on the grounds of undue prejudice under Rule 403.

A. Margulies's other employment is not admissible as "good acts" evidence.

Under Second Circuit law, Margulies should not be permitted to introduce evidence of his other, presumptively legal, contemporaneous employment to rebut the Government's proof that Margulies was a knowing participant in the Starship and AAPT frauds.

> Evidence of past "good acts" by a defendant is generally not probative unless a defendant is alleged to have "always" or "continuously" committed "bad acts," *United States v. Scarpa*, 913 F.2d 993, 1010 (2d Cir. 1990) (observing that "good acts" evidence "would only be relevant if the indictment charged [defendants] with *ceaseless* criminal conduct") (emphasis added), or where the evidence of "good acts" would undermine the underlying theory of a criminal prosecution, *United States v. Santos*, 201 F.3d 953, 962 (7th Cir. 2000) (conceding that "good acts" evidence is relevant when the prosecution contends "that every transaction ... was corrupt" or when the "good acts" evidence "cast[s] doubt on the government's theory" of how or why certain transactions occurred).

United States v. Damti, 109 F. App'x 454, 455–56 (2d Cir. 2004) (in a prosecution for defrauding customers of defendants' moving businesses, finding that district court did not abuse

its discretion by excluding evidence of moves in which customers were satisfied and no fraud occurred, when Government did not allege that the defendants engaged in "ceaseless" criminal conduct, that "all" of the defendants' customers were defrauded, or that the defendants' business was "permeated with fraud"). In this case, because the Government does not intend to argue that all of Margulies's income was derived from fraudulent ventures, or that Margulies had never held legitimate employment, Margulies cannot offer evidence of his employment with Key World Wide Foundation for the purpose of refuting such arguments.

B. The Government does not intend to offer evidence that Margulies was employed by Key World Wide Foundation.

As explained *supra*, evidence of Margulies's other employment at the time he committed the alleged crimes is not relevant to the issues that the jury will be asked to decide. Accordingly, the Government does not intend to offer any evidence of Margulies's employment at Key World Wide Foundation.

C. By arguing that he was too "busy and distracted" by his other employment to participate in a fraud scheme, Margulies opens the door for the Government to introduce evidence of the cocaine distribution conspiracy.

If, on the other hand, Margulies intends to offer evidence of his other employment not as "good acts" evidence, but for his stated purpose of "show[ing] that he was busy and distracted with other things" and that he "did not have the duty nor the time to be monitoring Bershan and Schwartz," (ECF No. 142, at 2), then the Government should be allowed to rebut this argument by introducing the Cocaine Evidence and other relevant evidence establishing that Margulies was not "too busy and distracted" to engage in a nearly-two-year cocaine distribution conspiracy, as alleged in Count Seven.[6] The Government expects the evidence would show that Margulies was

[6] Trial on Count Seven has been severed from trial on the other Counts in the Superseding Indictment.

in regular communication with Bershan throughout the course of his employment with the Key World Wide Foundation, including at critical junctions in the charged conspiracies. Among the topics Margulies and Bershan discussed were her desire for cocaine and whether she had enough money, from investor deposits, to purchase the drug. On numerous occasions, at Bershan's request, Margulies ordered cocaine from CC-2. Either Margulies or Bershan would transfer funds to CC-2 for the cocaine. When Bershan and Margulies were no longer living together in Los Angeles, CC-2 would send the cocaine to Margulies in Tennessee and Margulies would then send the cocaine to Bershan in New York.

If Margulies is permitted to argue that he was too busy and distracted to be a knowing participant in the Starship and AAPT fraud schemes, then the Government will request that it be allowed to rebut this argument by offering evidence of the cocaine distribution conspiracy.

IV. Margulies's Motion Concerning the Format of Email Exhibits

Citing Rule 403, Margulies asks the Court to bar the Government from offering exhibits in the form of "chain emails," described as "produc[ing] multiple duplicates of the original communication because each time a reply is made to the original and a reply is made to the reply the original communications are multiplied many times over." (ECF Doc. 143 at 2). Margulies's solution to this purported Rule 403 problem—to require each individual email and reply to be offered separately—suggests taking evidence *out of context* for the purpose of avoiding "misleading the jury." Fed. R. Evid. 403. The Government intends to offer several back-and-forth email communications between Margulies and defrauded investors that show Margulies made repeated false claims in response to investors' particular questions and concerns. The context of these conversations is eminently important for the trier of fact to discern, and removing Margulies's messages from their mooring would serve only to confuse the jury.

Including the full conversation certainly would not generate any prejudice, much less *unfair* prejudice "substantially outweigh[s]" the evidence's "probative value." *Id.*

Margulies's further suggestion that email statements with identical text sent to multiple parties should not be "duplicate[d]" is also meritless. (ECF Doc. 143 at 2). Margulies argues that introducing "multiple copies of any single email" would cause prejudice "by falsely making it appear that the Defendant made multiple alleged misrepresentations of the same facts." (*Id.* at 2-3). However, several important issues at trial depend on the fact that Margulies communicated falsehoods to multiple people. For one thing, the Government intends to prove the scope of the fraud in part by demonstrating Margulies's broad dissemination of false statements via email to investors. Moreover, different email threads led to different conversations with individual investors, in which Margulies attempted to defend the fraud schemes against varied inquiries. Perhaps most significantly, sending the same statement to a wide swath of investors is evidence of an intent, plan, and scheme to defraud, rather than a mere mistake, oversight, or accidental misrepresentation. Defense counsel is free to argue that Margulies sent certain emails simultaneously to multiple individuals. But Rule 403 does not preclude the admission of this core evidence of the defendant's conduct.

V. Margulies's Motion to Allow "Exculpatory Statements of Bershan"

Margulies seeks to admit as evidence "certain statements which are exculpatory of Margulies made by co-defendant Lisa Bershan which were made in text messages to Margulies, pro-offer statements to the Government, and during her guilty plea." (June 10, 2019 Amended Motion in Limine ("June 10 MIL") (ECF Doc. 150) at 1). Margulies seeks to admit these statements pursuant to "the Fifth Amendment right to due process, the Sixth Amendment right to

confrontation, and Fed. R. Evid. 801, 804." *Id.* For the reasons set forth below, this motion should be denied.

A. Background

The defendants in this case were arrested on or about October 11, 2017 pursuant to arrest warrants issued in connection with the Complaint, which charged the defendants with securities and wire fraud offenses in connection with the Starship scheme. The Indictment also charged the defendants with securities and wire fraud offenses in connection with the Starship scheme.

On April 13, 2018, Bershan began proffering with the Government in the hopes of obtaining a cooperation agreement. Throughout the course of approximately 14 proffer sessions, Bershan provided information about, *inter alia*, Margulies's knowing participation in the AAPT and Starship schemes, including about various misrepresentations he knowingly made or facilitated making to AAPT and Starship investors to induce them into providing funding for AAPT and Starship. Bershan also described conversations and communications with Margulies throughout the course of both the AAPT and Starship schemes. Some of the information Bershan provided during those proffers was arguably inconsistent, either with (a) statements she had made to Margulies during the course of the Starship scheme, or (b) other statements she had made during those same proffer sessions with the Government. The Government provided Margulies with some of these inconsistent statements, as well as additional statements made by Bershan during proffer sessions, to Margulies on December 26, 2018, out of an abundance of caution, pursuant to the Government's discovery obligations, including under *Brady v. Maryland*, 373 U.S. 83 (1963).

On December 18, 2018, Bershan pled guilty, pursuant to a cooperation agreement, to a nine-count superseding Information, which contained the following charges: (1) conspiracy to

commit wire fraud, in violation of Title 18, United States Code, Section 1349 (Count One); (2) wire fraud, in violation of Title 18, United States Code, Sections 1343 and 2 (Count Two); (3) aggravated identity theft, in violation of Title 18, United States Code, Sections 1028A and 2 (Count Three); (4) conspiracy to commit securities fraud and wire fraud, in violation of Title 18, United States Code, Section 371 (Count Four); (5) securities fraud, in violation of Title 15, United States Code, Sections 78j(b) and 78ff, Title 17, Code of Federal Regulations, Section 240.10b-5, and Title 18, United States Code, Section 2 (Count Five); (6) wire fraud, in violation of Title 18, United States Code, Sections 1343 and 2 (Count Six); (7) money laundering, in violation of Title 18, United States Code, Sections 1956(a)(B)(ii) and 2 (Count Seven); (8) conspiracy to distribute narcotics, in violation of Title 21, United States Code, Section 846 (Count Eight); and (9) illegal receipt of a firearm purchased outside of state of residence, in violation of Title 18, United States Code, Sections 922(a)(3), 924(a)(1)(D) and 2 (Count Nine).

Subsequent to her guilty plea, the Government obtained information demonstrating that Bershan had breached the terms of her cooperation agreement by failing to truthfully and completely disclose all information with respect to the activities of herself and others concerning all matters about which the Government had inquired of her. Specifically, Bershan failed to fully and truthfully disclose that, in at least December 2018, she had participated, along with her husband and co-defendant, Barry Schwartz, in what appeared to be a scheme to raise funds for a spinoff of Starship called by various names, including "Caffeinated Brands," through materially false and misleading statements.[7] The Government also obtained information demonstrating that Bershan had made misrepresentations regarding her employment.

[7] The Government's investigation regarding "Caffeinated Brands," is ongoing. The Government has produced to Margulies information gathered in connection with its investigation, to include: (1) recordings of telephonic communications between a marketing company employee and

On May 24, 2019, the Government informed counsel for Margulies that it did not intend to call Bershan as a witness at trial. On May 30, 2019, the Government produced to Margulies what would have been Bershan's statements pursuant to 18 U.S.C. § 3500 and *Giglio v. United States*, 405 U.S. 150, 154 (1972), which included (a) FBI 302s, notes, and documents related to law enforcement interviews of Bershan, and (b) Bershan's plea transcript and cooperation agreement.

Margulies now moves to admit the following categories of statements made by Bershan in (a) text messages from Bershan to Margulies during the course of the conspiracy, (b) proffer sessions with the Government, and (c) during her plea allocution, to include her guilty pleas to certain offenses.

B. Applicable Law

1. Hearsay

Hearsay is a declarant's out-of-court statement "offer[ed] in evidence to prove the truth of the matter asserted in the statement." Fed. R. Evid. 801(c). Certain types of out-of-court statements are excluded from the definition of hearsay. *See* Fed. R. Evid. 801(d). "Hearsay is admissible only if it falls within an enumerated exception." *United States v. Dupree*, 706 F.3d 131, 136 (2d Cir. 2013); *see* Fed. R. Evid. 802. "Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule." Fed. R. Evid. 805.

Bershan and Schwartz, who were seeking to hire the marketing company for a "Caffeinated Brands" marketing campaign, (2) Bershan's text messages relating to "Caffeinated Brands," and (3) emails reflecting Schwartz's communications with potential investors regarding "Caffeinated Brands," on which Bershan was frequently copied.

However, hearsay evidence should be excluded if "its probative value [in its permitted evidentiary use] is substantially outweighed by the danger of unfair prejudice . . . resulting from the impermissible hearsay use of the declarant's statement." *United States v. Johnson*, 529 F. 3d 493, 500 (2d Cir. 2008) (internal quotation marks omitted). *See* Fed. R. Evid. 403.

Accordingly, "[o]ut-of-court statements not offered for the truth of the matter asserted" may be admissible to, among other things, "furnish an explanation of the understanding or intent with which certain acts were performed." *United States v. Reifler*, 446 F.3d 65, 92 (2d Cir. 2006) (internal quotation marks omitted). For example, "a statement offered to show its effect on the listener is not hearsay." *Dupree*, 706 F.3d at 136 (citations omitted).

If a declarant is unavailable, Rule 804(b)(3) provides an exception to the hearsay rule for statements "against interest," including statements against penal interest. The rule defines a statement against penal interest as one that:

> (A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it . . . had so great a tendency . . . to expose the declarant to . . . criminal liability; and
>
> (B) is supported by corroborating circumstances that clearly indicate its trustworthiness . . . .

Fed. R. Evid. 804(b)(3).

To satisfy Rule 804(b)(3), the proponent must show by a preponderance of the evidence: "(1) that the declarant is unavailable as a witness, (2) that the statement is sufficiently reliable to warrant an inference that a reasonable man in [the declarant's] position would not have made the statement unless he believed it to be true, and (3) that corroborating circumstances clearly indicate the trustworthiness of the statement." *United States v. Wexler*, 522 F.3d 194, 202 (2d Cir. 2008).

"In assessing whether a statement is against penal interest within the meaning of Rule 804(b)(3), the district court must first ask whether 'a reasonable person in the declarant's shoes would perceive the statement as detrimental to his or her own penal interest.'" *United States v. Gupta*, 747 F.3d 111, 127 (2d Cir. 2014) (quoting *United States v. Saget*, 377 F.3d 223, 231 (2d Cir. 2004)). This question "can only be answered by viewing [the statement] in context," *United States v. Williams*, 506 F.3d 151, 155 (2d Cir. 2007), and "'in light of all the surrounding circumstances,'" *Gupta*, 747 F.3d at 127 (quoting *Williamson v. United States*, 512 U.S. 594, 604 (1994)). In *Williamson*, the Supreme Court held that "non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory," are not admissible as statements against penal interest. 512 U.S. at 600-01.

In order for a hearsay statement to be admissible as a statement against interest, the Second Circuit has "required corroboration of both the *declarant's* trustworthiness as well as the *statement's* trustworthiness." *United States v. Bahadar*, 954 F.2d 821, 829 (2d Cir. 1992) (emphasis in original); *accord United States v. Lumpkin*, 192 F.3d 280, 287 (2d Cir. 1999). "[T]he inference of trustworthiness from the proffered corroborating circumstances must be strong, not merely allowable." *United States v. Salvador*, 820 F.2d 558, 561 (2d Cir. 1987) (quotation marks omitted); *see also United States v. Doyle*, 130 F.3d 523, 543 (2d Cir. 1997) ("[T]he court does need to assure itself that there are, at least, clear indicia of reliability.").

Relevant factors in assessing the trustworthiness of statements against interest include: (1) the relationship between the declarant and the party with whom the declarant was speaking, *United States v. Sasso*, 59 F.3d 341, 350 (2d Cir. 1995); *United States v. Mathews*, 20 F.3d 538, 546 (2d Cir. 1994); (2) whether the statement was voluntary or made in a coercive environment, *Mathews*, 20 F.3d at 546; (3) whether the statement was made to "curry favor" with authorities,

Williamson, 512 U.S. at 603; *Mathews*, 20 F.3d at 546; *United States v. Stratton*, 779 F.2d 820, 829 (2d Cir. 1985); (4) whether the declarant was attempting to shift blame to another or minimize his own culpability, *Williamson*, 512 U.S. at 603; *Mathews*, 20 F.3d at 546; (5) the existence of corroborating evidence of the declarant's statement, *Wexler*, 522 F.3d at 202; (6) the extent to which the declaration was against penal interest, *id.*; (7) the trustworthiness of the declarant in the context in which the statement was made, *Doyle*, 130 F.3d at 544; (8) whether the declarant's statements were contradictory or the declarant recanted, *id.* at 542-44; and (9) whether the declarant's statement was based on personal knowledge.

C. Discussion

1. Text Messages

Margulies seeks to admit four text message exchanges (Statements 1, 3, 5, and 7 in his brief)[8] between himself and Bershan during the course of the conspiracy, arguing that Bershan's statements to him are "not offered for the truth of the matter asserted" but for "the state of mind of Margulies" and because they "support[] Margulies' assertion that he believed there was a Monster deal based upon statements by Bershan." (June 10 MIL at 4). The Government intends to offer these statements in its case-in-chief, and, thus, Margulies's motion is moot as to these text messages.

2. Bershan's Proffer Statements Offered for Margulies's "State of Mind"

Margulies purportedly seeks to offer several of Bershan's proffer statements not for the truth of the matters asserted but to show his "state of mind," when, in fact, the statements *are*

[8] For ease of reference, "Statement [Number]" refers to the numbered statements listed in Margulies's brief. The Government notes that, with respect to Statements 1, 3, 5, and 7, the versions that Margulies provides in his motion differ slightly – although not in substance – from the actual cellphone extract report that reflects the text messages (Ex. 2 to the June 10 MIL).

being offered for the truth of the matter asserted and are not admissible pursuant to any applicable hearsay exception.[9]

For example, Margulies seeks to introduce Statement 12 ("Bershan told Margulies and Schwartz . . . there was going to be a Monster Deal") and Statement 14 ("Bershan told Margulies on the phone a few months after a falling out with Bayern that she was going to pursue a deal with Monster but she did not mean it"). Margulies argues that these statements are "offered to show the state of mind of Margulies that he believed there would be a Monster deal." (June 10 MIL at 5-6). But these statements are hearsay within hearsay – they reflect statements that Bershan made to law enforcement agents *about* what she had told Margulies and are not the statements she made directly *to* Margulies during the course of the conspiracy (like Statements 1, 3, and 5, which would arguably be admissible under Margulies's non-hearsay state-of-mind theory). In other words, these are Bershan's statements to law enforcement agents, not to Margulies, and are being offered for their truth – *i.e.*, that she *did* tell Margulies that there was a deal with Monster or that she was going to pursue a deal with Monster – and should not be admitted.[10]

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[9] Margulies does not propose how or from whom he would elicit Bershan's out of court statements in proffer sessions. For the purpose of this motion, the Government will assume that Margulies intends to call a law enforcement agent who was present during the relevant proffer sessions.

[10] Additionally, these statements, offered in isolation, would be misleading and present the jury with a false impression that Bershan's proffer statements to the Government as a whole exculpated Margulies – which they did not – and that the Government pursued its prosecution of Margulies nonetheless. As Margulies concedes, Bershan also provided the Government with incriminating information about Margulies's involvement in the Starship scheme. (June 10 MIL at 3 ("In full disclosure to the Court Bershan also made statements that at one point Margulies knew that there was no deal with Monster, although Margulies asserts that those claims conflict with Bershan's admissions about her continued lies to Margulies.")). In fact, during the course of her proffer sessions, Bershan told the Government, in sum and substance, that she had told Margulies on other occasions during the course of the conspiracy that there was not going to be a

Similarly, Statement 11 contains multiple layers of hearsay for which Margulies has not offered a non-hearsay basis or applicable exception to the rule against hearsay. Statement 11 (as offered by Margulies) is:

> Forman told Bershan he could set Bershan up with Bayern . . . who was a 17% shareholder in Monster. . . . Bershan repeated the conversation about Monster she had with Forman to Margulies.

As an initial matter, the Government notes that Margulies's excerpting of statements is inaccurate and the ellipses reflect substantial omissions. Statement 11 is actually a patchwork of portions of two different sentences spanning three paragraphs. (*See* June 11 MIL, Ex. 3 at 4). The result is a wildly misleading presentation of Bershan's statements at this proffer session. In any event, Margulies seeks to offer his version of Statement 11 under the theory that "it is not being offered for the truth of the matter asserted" but "to show the state of mind of Margulies that he believed there would be a Monster deal." But, again, these statements are hearsay within hearsay – they reflect statements that Bershan made to law enforcement agents *about* what she had told Margulies, and are not the statements she made directly *to* Margulies during the course of the conspiracy. They are being offered for their truth – i.e., that Bershan *did* tell Margulies about her conversation with Forman, and the substance of that conversation – and should not be admitted.

Statement 15 ("Starship did hire a lawyer and an accountant [as of January 2016]"), Statement 19 ("Bershan started and sold Incredible Edibles which she sold for six million"[11]),

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deal with Monster. And, as Margulies admits, Bershan provided additional incriminating information about Margulies's involvement in both the AAPT and the Starship schemes, aggravated identity theft, and his illegal transfer of a firearm to her.

[11] Statement 19 is nowhere to be found in the FBI 302 excerpt that Margulies cites. (June 10 MIL, Ex. 3 at 3 (USAO_2_000017109)). The closest statement in the referenced FBI 302 is: "In or about the late 1980s, AR Baron brokered the sale of Lisa's Gourmet Snacks aka Incredible Edibles to Labatt's Beer for approximately $6 million." *Id.* Unless Margulies provides another

and Statement 20 ("By [approximately] 2013 or 2014, AAP[T]'s [pet] bars were in Walmart[s] and 7-11[s.] Walgreens had [accepted AAPT's pet bars, however the pet bars never made it to Walgreens' shelves]")[12] are even further attenuated from the non-hearsay state of mind basis offered by Margulies. Margulies does not even assert that these were statements made to him. Instead, he simply asserts that they are relevant for the facts they convey – that Starship had a lawyer and an accountant; that Bershan started and sold another company; or that AAPT had a real product that was really sold in stores – and that they provide context for the defense theory that "when [Bershan] told [Margulies] she had made contacts at Monster and a deal with Monster was in the works he had reason to believe her." (June 10 MIL at 7-8). Thus, these statements, too, are inadmissible.

3. Bershan's Proffer Statements Offered as "Statements Against Penal Interest"

Margulies also seeks to admit the following statements made by Bershan during her proffers pursuant to Rule 804(b)(3), as statements against penal interest made by an unavailable witness:

> Statement 2 (in reference to text message in Statement 1): "Bershan believed she needed to keep the lie going [In line 1249,] when Bershan stated 'we[']re past empty[,]' she meant we[']re out of money."

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source for the purported statement, Margulies's version of Statement 19 should not be admitted, at the very least, because it was not made.

[12] This is another example of a proffer statement which Margulies incorrectly excerpts from the FBI 302 report. Margulies's version of Statement 20 is: "By 2013- 2014 AAP bars were in Walmart and 7-11 stores and Walgreens had agreed to place an order." (June 10 MIL at 7). The statement, as is reflected in the FBI 302 report, is: "By approximately 2013 or 2014, AAPT's pet bars were in Walmarts and 7-11s. Walgreens had accepted AAPT's pet bars, however the pet bars never made it to Walgreens' shelves."

Statement 4 (in reference to text message in Statement 3): "Bershan told Margulies she was talking to Monster to get him off her back . . . 'throwing him a bone' . . . Bershan told Margulies she was talking to Monster to get rid of him."[13]

Statement 6 (in reference to text message in Statement 5): "Bershan advised that this text to Margulies was a lie about contact with someone from Monster."

Statement 8 (in reference to text message in Statement 7): "Bershan . . . believed she texted this to Margulies in an effort to keep Monster going."[14]

Statement 9: "Starship Snacks and the Awake company were started by Bershan."[15]

Statement 10: "Bershan referred Gershon to call Margulies regarding investing."[16]

Statement 12: "Bershan told Margulies and Schwartz [she had given Bayern 33% of Awake and] there was going to be a [deal with] Monster []."

Statement 13: "Bershan sent pictures of her house implying she had money in order to make Bershan look better to investors."

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[13] The full statement that Margulies excerpts for his version of Statement 4 is: "In June 2017, Bershan was in New York. Bershan told Margulies she was talking to MONSTER to get him off her back. Margulies came to New York a few times between December 2016 and June 2017. Bershan described it as 'throwing him (Margulies) a bone.' Bershan had not spoken to Monster, but did not tell this to Margulies. Bershan told Margulies she was talking to Monster to get rid of him." (June 10 MIL, Ex. 4 at 4).

[14] The full statement that Margulies excerpts for his version of Statement 8 is: "Bershan was not sure what 'Monster is back' meant, but believed she texted this to Margulies in an effort to keep the Monster story going." (June 10 MIL, Ex. 4 at 4).

[15] The full statement that Margulies excerpts for his version of Statement 9 is: "Starship Snacks aka the Awake Corporation (hereinafter referred to as Starship) was created by Bershan." (June 10 MIL, Ex. 3 at 1). Furthermore, Margulies's argument that Statement 9 is relevant because it demonstrates that the companies were started by Bershan, and not the defendant, takes this statement out of context and distorts its meaning. The very next sentence reflected in the FBI 302 (June 10 MIL, Ex. 3 at 1) is: "Margulies had been involved with Starship from day 1."

[16] Margulies argues that Statement 10 is "an admission by a witness who is unavailable to testify that confirms that Margulies was acting at the direction of the unavailable witness to communicate with investors [and] can tend to confirm that he was merely a messenger not a knowing conspirator." (June 10 MIL at 5). That is an unsupported interpretation of Statement 10, which says nothing about Margulies acting (or not acting) at Bershan's direction.

> Statement 14: "Bershan told Margulies on the phone a few months after a falling out with Bayern that she was going to pursue a deal with Monster[,] but [Bershan] did not mean it."
>
> Statement 16: "Bershan lied a lot to the investors."
>
> Statement 17: "Bershan wanted to keep the fraud going because Bershan thought she could eventually make Starship work and everyone would make money. Bershan wanted to look like a big shot to everyone."
>
> Statement 18: "Bershan told investors there was a deal with Monster for a two pronged reason. Bershan wanted to raise money for Starship and Bershan was bleeding money personally."
>
> Statement 21 (in reference to text messages reviewed with Bershan)[17]: "Bershan advised this exchange was about work being done in her apartment in New York. Margulies was handling Bershan's apartment renovation. Investor funds were used for the renovation. Alejandra was the 'couch person' and she was paid in cash. Judy, the carpet vendor[,] was paid in cash as well. Margulies would pay with his money, and Bershan would replace it, or Bershan would pay directly."

Here, because Bershan's attorney has represented that she would invoke her Fifth Amendment right not to testify, she is an unavailable witness for purposes of 804(b). *United States v. Jackson*, 335 F.3d 170, 177 (2d Cir. 2003). However, Margulies has not met his burden under Rule 804(b)(3), and these statements should not be admitted.

[17] The text messages, which Margulies also seeks to admit, are as follows:

> Bershan: This whole rant and rage doesn't give me any answe [message truncated]
>
> Margulies: I just sent a schedule to Alejandra to provide spe [message truncated]
>
> Margulies: You were copied.
>
> Bershan: Just take my advice- make my life seem less and al [message truncated]

Margulies offers no evidentiary basis by which these statements would be admissible if offered by him.

First, the particular statements at issue are not against Bershan's penal interest, and, indeed, Margulies does not provide a basis for *why* these statements would be against Bershan's penal interests. To the extent that Margulies would argue that they were against Bershan's penal interest because she was admitting to her own participation in the charged schemes, the context in which these statements were made confirm that they were not in fact against her penal interest. It is undisputed that the statements at issue were made in the course of Bershan's proffer sessions with the Government, in the hope of securing a cooperation agreement. The Second Circuit has suggested that statements made under the protections afforded by a proffer agreement are "not so clearly against [the declarant's] interest" as to fall within the scope of Rule 804(b)(3). *Doyle*, 130 F.3d at 543 n.16; *see also United States v. Ulbricht*, 858 F.3d 71, 122 (2d Cir. 2017) ("Given the cooperation agreement, the government's role at Jones's future sentencing, and the penalties for lying to the government, it is far from clear that it was against Jones's interest to disclose details of his criminal activities at the time the statement in question was made."); *United States v. DeVillio*, 983 F.2d 1185, 1190 (2d Cir. 1993) (statements made by informant wearing a wire were not against his penal interest because they "did not 'subject him to criminal liability'"). Thus, a reasonable person considering the substance of Bershan's statements and the circumstances in which they were made would not "perceive the statement[s] as detrimental to . . . her own penal interest." *Saget*, 377 F.3d at 231.

Second, it is well established that the party – Margulies – offering the statements at issue must also provide evidence of the declarant's – Bershan's – trustworthiness. The Second Circuit has repeatedly reaffirmed that Rule 804(b)(3) requires corroboration of the trustworthiness of both the statement and the declarant. *E.g., Gupta*, 747 F.3d at 127; *United States v. Paulino*, 445 F.3d 211, 220 (2d Cir. 2006); *Jackson*, 335 F.3d at 178; *Lumpkin*, 192 F.3d at 287. Even

assuming the trustworthiness of the above-referenced statements, Margulies would have to argue that Bershan herself is trustworthy in order to admit the statements, and does not do so because, presumably, that would be inconsistent with his defense theory that Bershan lied to him during the course of the charged schemes.

Thus, because Margulies fails to carry his burden of establishing that these statements were against the declarant's penal interest in the context in which they were made, and does not even address the reliability of the declarant, these statements are not admissible pursuant to Rule 804(b)(3).

4. Bershan's Proffer Statements Offered Pursuant to Margulies's "Fifth Amendment right to due process"

As an alternative to his non-hearsay and Rule 804 arguments, Margulies also offers certain statements – Statement 9 ("Starship Snacks and the Awake company were started by Bershan"), Statement 10 ("Bershan referred Gershon to call Margulies regarding investing"), and Statement 15 ("Starship did hire a lawyer and an accountant") – "pursuant to due process," arguing that they should be admitted "as a matter of due process because the statements lend support to the Defendant's theory of defense." (June 10 MIL at 9-10). The single case Margulies cites for this proposition is *Chambers v. Mississippi*, 410 U.S. 284 (1973), the facts of which are easily distinguishable from this case.

In *Chambers*, the Supreme Court reversed the conviction of a defendant who had been precluded from cross-examining a witness regarding that witness's prior confession to the crime with which the defendant was charged, and was also precluded from admitting testimony from other people to whom that witness had previously confessed to the charged crime. *Chambers*, 410 U.S. at 291-94. The Supreme Court found that Mississippi's evidentiary rules that precluded a party from cross-examining its own witness and failed to recognize a hearsay exception for

declarations against penal interest had been unconstitutionally applied where the proffered hearsay "bore persuasive assurances of trustworthiness" and was "critical" to the defense. *Id.* at 302. Notably, in concluding that the proffered hearsay testimony was reliable, the Court relied on the fact that "each [statement] was corroborated by some other evidence in the case." *Id.* at 300. Ultimately, the Court concluded that hearsay rules could not be applied "mechanistically" to preclude reliable defense testimony. *Id.* at 302.

As an initial matter, *Chambers* is inapposite in that it involves a multiple prior confessions to an indisputably single perpetrator crime by someone other than the defendant who was charged with committing the crime. Here, the defendant is charged with participating in criminal schemes and conspiracies involving multiple perpetrators, such that even if Statements 9, 10, and 15 could be deemed "confessions" – which they squarely cannot – they are not statements that in any way tend to eliminate or reduce Margulies's culpability. Regardless, and for the reasons set forth in section 5.C.3., above, these statements are not within the basic rationale of the hearsay exception for declarations against interest, and, therefore, should not be admitted under Margulies's "due process" theory or Margulies's Rule 804 theory.

5. Bershan's Plea Allocution and Guilty Pleas

Margulies also seeks to admit the following statement made by Bershan during her plea proceeding: "I falsely said to investors that we were related to the Monster Beverage Company." (Statement 22).[18] Margulies argues that this plea allocution statement is admissible pursuant to

[18] Bershan made this statement in response to a question by the Honorable Debra Freeman, United States Magistrate Judge, asking Bershan to "give [] an example of a statement you believe was material that may have affected an investor's investment decision." (December 18, 2018 Plea Tr. at 9). To the extent Margulies wants to argue that Bershan's statement – "I falsely stated" – somehow absolves him because she did not say, for example, that she made that statement with others, that argument would constitute an impermissible use of Statement 22. A

Rule 804(b)(3) as a statement against penal interest, and is relevant because "if Bershan lied to investors about Monster it makes it more likely she also lied to Margulies." (June 10 MIL at 8). The Government objects, at the least, to Margulies's proffered basis pursuant to Rule 403, as any probative value of Bershan's admission that she lied to investors is outweighed by the danger of unfair prejudice resulting from Margulies's proffered use of such a statement – that it goes to Bershan's propensity for lying, and to demonstrate that, as such, she "also lied to Margulies."

Margulies also seeks to admit the fact that Bershan pled guilty to (a) conspiracy to commit wire fraud with respect to AAPT (Statement 23), (b) wire fraud with respect to AAPT (Statement 24), (c) conspiracy to commit securities fraud and wire fraud with respect to Starship (Statement 25), (d) securities fraud with respect to Starship (Statement 26), (e) wire fraud with respect to Starship (Statement 27), and (f) aggravated identity theft in connection with the AAPT scheme (Statement 28). Margulies does not seek to admit Bershan's guilty plea to the additional charges in the superseding Information to which she pled guilty, such as Count Seven (money laundering), Count Eight (conspiracy to distribute cocaine), or Count Nine (illegal receipt in state of residence of a firearm purchased or acquired outside of the state of residency).

Margulies also argues that the "guilty pleas are relevant because where a defendant asserts as his defense that he was misle[d] by another guilty party, the fact that the other guilty party has acknowledged her guilt tends to make the assertion that the defendant was misled by her more likely." (June 10 MIL at 9). Margulies fails to provide a proper evidentiary basis by which these statements would be admissible to prove his theory – that the fact of her guilty plea

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plea allocution does not require the defendant to identify every detail of the defendant's criminal conduct, but rather requires only that the Court be satisfied "that there is a factual basis for the plea." Fed. R. Crim. P. 11(b)(3). Margulies cannot argue that a particular perceived omission in Statement 22 somehow diminishes his culpability.

makes it more likely that he was misled by her. Moreover, to admit Bershan's guilty pleas as to the AAPT and Starship fraud schemes, but exclude Bershan's guilty plea to Count Nine, would be confusing and misleading to the jury, which would be left to wonder (improperly) whether Bershan also faced or pled guilty to a charge involving the transfer of the firearm that forms the basis for Count Eight of the Indictment against Margulies.

D. Statements Incriminating Margulies

Margulies also moves in the abstract to preclude the Government from "produc[ing] as evidence any statement that was made by Bershan or any other witness that incriminates Margulies even if Margulies presents exculpatory parts of that statement, unless the Government produces the witness and subjects the witness to cross examination." (June 10 MIL at 10). There is no basis for the Court to act on this motion in the abstract, and the Government does not read this motion as warranting any action from the Court until particular evidence is offered and a proper objection is made.

CONCLUSION

For the reasons set forth above, this Court should deny Margulies's motion to suppress on the merits. With the limited exceptions set forth above, the Court should also deny Margulies's motions *in limine*.

Dated: New York, New York
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Respectfully submitted,

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